

IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

ECONOMIC CASE NO. 05 OF 2022

REPUBLIC

VERSUS

- 1. ABDUL MOHAMED SHABAN**
- 2. CONRAD JELAZI @ CHAMBANENJE**

JUDGMENT

ISAYA, J.:

The accused persons, Abdul Mohamed Shaban and Conrad Jelazi @ Chambanenje being the first and second accused persons respectively stand charged for the offence of trafficking in Narcotic Drugs contrary to section 15(1) (a) of the Drugs Control and Enforcement Act, [Cap 95 RE 2019] read together with paragraph 23 of the First Schedule to and section 57(1) and 60 (2) of the Organized Crime Control Act [Cap 200 RE 2019] as amended.

It is alleged that, on the 27th day of March 2020 at Kwa Mfipa area within Kibaha District in Pwani Region, the accused persons were found trafficking in 80.21 kilograms of narcotic drugs namely Cannabis Sativa commonly known as 'Bhangi'.

At the trial, Mr. Emmanuel Maleko, Senior State Attorney, Mr. Clemence Kato, Mr. Grey Uhagile, Ms. Gladness Mchami, Ms. Beatha Kaaya, Ms. Amina Macha and Ms. Gloria Simpasa, Learned State Attorneys, represented the Republic, while Mr. Omari Kilwanda and Mr. Dickson Ngowi, Learned Advocates, represented the first and second accused persons respectively. I extend my appreciation to the team of members of the bar for their commitment, hard work, and attentive cooperation.

In the bid to prove the case against the accused persons beyond a reasonable doubt, the prosecution side called in seven (7) witnesses to testify, namely, F 3490 Sgt Okoka (PW1), WP 5235 CPL Zaituni (PW2), Theodory Ludanha (PW3), WP 3665 (PW4), F. 4870 SGT. Liniel Sikauki (PW5), Inspector Omar Mwinyi (PW6) and Hemed Rajabu (PW7). They also tendered seven (7) exhibits, which were admitted, thus: Exhibit P1, Certificate of Seizure; Exhibit P2, narcotic drugs Known as Bhang in two Sulphate bags; Exhibit P3, Government Analyst Report (Examination Report); Exhibit P4, Motor Vehicle Toyota Noah with Registration Number T300 DCS; Exhibit P5, the Exhibit Register (PF 16); Exhibit P6, the Vehicle Inspection Report and Exhibit P7 Sample Submission Form (DCEA 001); the statement of E.3164 CPL Hassan. On the other hand, the accused persons testified themselves under oath as DW1 and DW2. Besides, they didz not tendered any exhibit.

May be, at this juncture, I find it very crucial to give a brief summary of the prosecution's case. The body of evidence by the prosecution side presented a case that, on 27th March 2020, about 2100 hours, PW1 with another police officer P/C Onesmo(PW-) while they were on road patrol between Mlandizi and Kibaha, specifically at Miembe saba area, they saw a traffic jam on the road. According to them, they decided to go to the said area, and upon reaching at the place, they saw an accident, whereby one vehicle had knocked the front vehicle in a traffic jam. Surprisingly, the knocked motor vehicle T 300 DCS Toyota Noah (Exhibit P4) was swiftly driven away. They suspected and PW1 decided to go after the vehicle (Exhibit P4) and successfully apprehended it at the Mwendapole area. The driver (the first accused person) was arrested while the other two persons from the said motor vehicle ran away. PW1 conducted the search on Exhibit P4 in the presence of the first accused person and PW7 as an independent witness. During the said search he found two sulphate bags containing leaves which later after being weighed and tested by PW3 confirmed to be narcotic drugs namely Cannabis sativa commonly known as bhang weighing 80.21 kg (Exhibit P2). He seized the same via the certificate of seizure (Exhibit P1) which was signed by PW1, PW7, and the first accused person.

Thereafter PW1 took Exhibits P2 and P4 together with the accused person to Kibaha Police Station where he handed over the said Exhibits and

the accused person at the CRO to CPL Zaituni (PW2). PW2 after receiving the exhibits, filed a case with number KBA/RB/1678/2020. She then kept the exhibit until the following morning when she handed over Exhibits P2 and P4 to one afande Kassim. The evidence shows further that on 28th March 2020 in the morning, PW4(Exhibit storekeeper) received Exhibits P2 and P4 from D/CPL Kassim. She registered the exhibits in Exhibits P5 with entries number 65 and 66 of 2020 respectively, thereafter she labeled the exhibits with their respective exhibit number, together with IR number KBA/IR/1314/2020.

On the 2nd April 2020, D/CPL Kassim went to PW4 where he was handed Exhibit P2 for the purpose of taking the same to the Chief Government Chemist (CGC) for laboratory test. On the same day, D/CPL Kassim handed over the Exhibit P2 to PW6 who took the same to the CGC. PW6 handed over Exhibit P2 to PW3 who weighed and conducted a preliminary test and returned back to PW6 and then PW6 took the said Exhibit to Kibaha police station where he handed it over to D/CPL Kassim. The evidence shows that on the same day in the evening hours, D/CPL Kassim handed over exhibit P2 to PW4 who kept the same until 04th November 2022 when she handed it over to D/CPL Elisante for the purpose of taking the same to the court. In the laboratory test conducted by PW3, it was revealed that Exhibit P2 is a narcotic drug namely cannabis sativa, (bhang) weighed 80.21 kg, after this finding, PW3 prepared Analyst Report (Exhibit P3).

At the closure of the prosecution case, the accused persons were found with a case to answer in respect of the offence charged with. The accused persons firmly denied being found in trafficking in narcotic drugs in question. The first accused person denies to be arrested on 27th March 2020 in Mwendapole area.

On the other hand, the defence evidence was characterized by the general denial. The evidence of the first accused (DW1) is to the extent that, on 28th March 2020 he was arrested in Loliondo area within Kibaha district along the road while he was walking with his lover going to her place. In his evidence, DW1 had a version that he was arrested for the allegation that he had love affairs with a certain policeman's wife. He was taken to Mji Mdogo Police Station where he was kept until 09th April 2020 when he was arraigned before the Kibaha District Court and joined with another person in the case of trafficking in narcotic drugs.

Further, the evidence of DW2 had a different version that he was arrested at his home on the 30th March 2020 during the morning time and taken by two policemen including PW7 to Mji Mdogo Police Station for the allegation of being involved in stealing motorcycles in a conspiracy or network. He was kept in the lockup until 09/04/2020 when he was arraigned

to Kibaha District Court where he was joined with the first accused person on the present offence.

Having gone through the evidence for both sides, the prosecution and both accused persons, there are four issues for determination, **One**, *whether Exhibit P2 is narcotic drugs; Two*, *whether Exhibit P2 was retrieved from the first accused person; Three*, *whether the first and second accused persons raised any doubt against prosecution case, and Four*, *whether the chain of custody of Exhibit P2 was maintained.*

Starting with the first issue, in the determination of the issue at hand I will consider the prosecution evidence particularly PW3, Chemist at the Government Chemist Laboratory Authority. Now, in the testimony of PW3, he stated that on 02/04/2020 while in his office he received Exhibit P2 from PW6, he registered with Laboratory Number 1205 of 2020 and thereafter together with PW6 went to Laboratory where he opened two sulphate bags containing dry leaves (Exhibit P2), he weighed the same without packaging materials and got a total weight 80.21 kilograms. He then conducted a preliminary test and confirmatory on samples from each bag of Exhibit P2 and results showed that the samples were containing the chemical compounds called tetra hydro cannabinol (THC) which are found in the cannabis sativa (bhanghi) only. Having got the result, he prepared the laboratory analyst report (Exhibit P3)

showing that Exhibit P2 is the narcotic drug Cannabis Sativa “bhangi” which weighed 80.21 kilograms. He signed the report and it was confirmed by one Mr. David L. Elias, the Acting Director of Forensic Science and DNA.

It is on record that PW3 is a Government Chemist who was authorized to conduct laboratory tests via Government Notice No. 519 of 2010. He is an expert who testified on how he weighed Exhibit P2 to find out the weight of Exhibit P2. PW3 also testified that he carried out preliminary and confirmatory tests over the exhibit in question. I agree that PW3 is an expert in his field, thus he is required to state and made it clear before the court how the samples were drawn and how he conducted the said tests for the court to draw a big picture from his evidence on how the findings were obtained. In this regard, I am well aware that the duty of experts is to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or magistrate to form their own independent judgment by the applications of these criteria to the facts proved in evidence (see the case of **DAVIE V EDINBURGH MAGISTRATES**, 1953 S.C.35,40). Also, the case of **Sylvester Stephano v. Republic**, Criminal Appeal No. 527 of 2016 CAT at Arusha (unreported), where the Court of Appeal breathed the same principle, thus;

!.....that the duty of an expert is to furnish the court with the necessary scientific criteria for testing the accuracy of their conclusions

so as to enable the court to form its own independent judgment by application of these criteria to the facts proven in evidence.'

In the instant case, there is no evidence or fact contradicting the piece of evidence of PW3 and its subsequent report, Exhibit P3. In any way, I think, the Latin maxim; "*error qui non resistur, approbatur*" gets its way. Then we have Section 48A (2) of the Drugs Control and Enforcement Act, [Cap 95 R.E 2019], which provides for that;

'Notwithstanding anything contained in any other law for the time being in force, any document purporting to be a report signed by a Government Analyst shall be admissible as evidence of the facts stated therein without formal proof and such evidence shall, unless rebutted, be conclusive.'

In the instant case, PW3 produced Exhibit P3 which is the Government Laboratory Analyst Report, signed by PW3 who is the Government Analyst, and confirmed by his superior, showing that Exhibit P2 is narcotic drugs namely cannabis Sativa, 80.21 kilograms and the effects of the said narcotic drugs. From the basis of the provision of law above the report is conclusive proof that Exhibit P2 is a narcotic drug namely cannabis sativa "Bhangji" as defined under section 2 of the Drugs Control and Enforcement Act, Cap 95 RE. 2019 "the DCEA", and it weighed 80.21 kilograms.

Coming to the second issue, it is the evidence of prosecution particularly PW1 and PW7, that on a fateful day at about 2100hours, PW1 with another police officer P/C Onesmo while they were on road patrol between Mlandizi and Kibaha, at Miembe Saba area, PW1 successfully apprehended the Motor vehicle with reg. No. T 300 DCS made Toyota Noah (Exhibit P4) and arrested the first accused person who was the driver of the vehicle at Mwendapole, kwa mfipa area while two persons from the said motor vehicle ran away. PW1 conducted the search on Exhibit P4 in the presence of the first accused person and PW7 as an independent witness. That during the said search he found two sulphate bags containing narcotic drugs namely cannabis sativa (Exhibit P2). PW1 seized the same via the certificate of seizure (Exhibit P1) which was signed by PW1, PW7, and the first accused person. Thereafter PW1 took Exhibits P2 and P4 together with the accused person to Kibaha Police Station for further necessary actions.

During cross-examination of PW1, he stated that he had no search warrant before conducting the search on **Exhibit P4** and seizure of exhibits P2 and P4. His evidence was supported by PW7 who stated that while going to his home, at kwa Mfipa area he was stopped by traffic police, he saw Exhibit P4 packed on the side of the Petrol station, he stopped and was informed by another traffic police that he needed him to witness the search of Exhibit P4 in the presence of the first accused person being the driver of

exhibit P4. According to him, he witnessed the search where Exhibit P2 was retrieved from Exhibit P4, thereafter he signed on Exhibit P1, also the traffic officer and the first accused person signed too.

On the other hand, the first accused person denied being arrested at the place claimed by prosecution witnesses and thus relied on the defence of *alibi*. However, his *alibi* was in contravention of section 42 (1) (2) of the EOCCA, the law requires that the accused person ought to have notified the Court of his intention to rely on an *alibi* as his defence during the preliminary hearing or to furnish the prosecution with the particulars of their *alibi* before the closure of prosecution case. The accused persons in the instant case did not do. The first accused person was duly represented by learned Advocates who were conversant with the procedure of notifying the Court to that effect, thus his *alibi* was not honest rather than an afterthought, however, the court will keep considering their defence evidence. See the case of **Hamisi Bakari Lambani Vs Republic**, Criminal Appeal No. 108 of 2012 CAT at Mtwara (Unreported).

But again, the first accused person in his defence denied having signed in Exhibit P1, the thing which was not raised anywhere during the testimony of PW1 and PW7. It is the trite principle that failure to cross-examine a witness on an important matter amount to acceptance of the truth of evidence of that witness - See for example the cases of **Cyprian Athanas**

Kibogoyo v. Republic, Criminal Appeal No. 88 of 1992, **Damian Luhehe v. Republic**, Criminal Appeal No. 501 of 2007 and **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (all unreported). Consequently, in the instant matter as the first accused person failed to cross-examine on the matter of non-signing of Exhibit P1 at Kwamfipa area, it connotes that he accepted the said evidence to be the truth.

Also, according to the circumstances of this case, this court is of the considered view that the search conducted by PW1 was valid as clearly reflected in PW1's evidence that the offence occurred while he was on other duties of the road safety patrol. There was no prior information hence the circumstances fall under emergency search in terms of section 42 of the Criminal Procedure Act. See also the cases of **Chacha Jeremiah Murimi & 3 Others v. Republic**, Criminal Appeal No. 551 of 2015; **Moses Mwakasindile v. Republic**, Criminal Appeal No. 15 of 2017; **Ernest Jackson @ Mwandikaupesi and Another v. Republic**, Criminal Appeal No. 408 of 2019 (All unreported).

In the circumstances above, this court regards that Exhibit P1 is valid and I am fully subscribed to the principle laid in the case of **Song Lei vs. the DPP**, and **the DPP Vs Xiao Shaodan and Two Others**, Consolidated Criminal Appeal Nos. I6'A' of 2016 & 16 of 2017, CAT at Mbeya (unreported), the Court of Appeal stated that;

'...having signed the certificate of seizure which is in our considered view valid, he acknowledged that the horns were actually found in his motor vehicle.'

At this juncture, having reasoned as above and in light of the cited authorities above, it is the finding of this court that Exhibit P2 was found within Exhibit P4 while both of them were under the possession of the first accused person.

The third issue examines whether the first and second accused persons raised any doubt against the prosecution case. As rightly stated earlier the first accused person DW1 denied being arrested at the place claimed by prosecution witnesses. Clearly stated, he raised the defence of *alibi* which is in contravention of section 42 (1) (2) of the EOCCA. See also the case of **Hamisi Bakari Lambani** (Supra). Anything's more, DW1 in his defence denied having signed in Exhibit P1, and that he was arrested on 28th March 2020 at Loliondo for the accusation of having love affairs with a policeman's wife a thing which was not raised anywhere during the testimony of PW1, PW2, and PW7. And it is the evidence of the second accused person (DW2) that he was arrested at his home, Kidimu area on 30th March 2020 for an accusation of stealing motorcycles.

I hasten to the finding that the defence of the first accused person is all an afterthought since at the beginning he has conceded the evidence of

prosecution witnesses regarding the matter above as he has stated in his defence. Sadly, he did not cross-examine the date and place of his arrest, his accusations, and the fact that he signed a certificate of seizure, thus implying the acceptance of this evidence to be the truth. It is the trite principle that failure to cross-examine a witness on an important matter amount to acceptance of the truth of evidence of that witness - See for example the cases of **Cyprian Athanas Kibogoyo, Damian Luhehe, and Nyerere Nyague** (Supra).

Now, what can be said of the second accused? A curious scrutiny of the prosecution evidence will reveal that no single prosecution witness testified on the connection of the second accused person in this case. Whether it was by accident or by design, the prosecution evidence leaves the second accused person untouched as far as the case at hand is concerned. I think D/CPL Kassim who was mentioned as the Investigator of this case could be in a better position to tell the court how the second accused person was involved in the commission of the charged offence in this case. It is unfortunate that the prosecution failed to parade D/CPL Kassim (Investigator) as a witness in their case. In the case of **Azizi Abdallah v. Republic** [1991] TLR 71, it was held that;

'...the general rule and well-known rules are that the prosecutor is under prima facie duty to call those witnesses who, from their connection

with the transaction in question; are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution.'

See also the cases of **Mashimba Dotto @ Lukubanija v. The Republic**, Criminal Appeal No. 317 of 2013, and **Jumanne Marco v. Republic**, Criminal Appeal No. 522 of 2016 (Both unreported). To that end, I am not inclined to find that the case has been proven to the hilt against the second accused. On the contrary, the issue is hereby answered negatively regarding the first accused person.

In the fourth issue which makes scrutiny as to whether the chain of custody of Exhibit P2 was maintained, the court is called upon to examine and dwell on the testimony of PW1, PW2, PW3, PW4, PW6, and PW6 as well as Exhibit P1, P5, P7, and P8. It is the evidence of PW1 an officer who executed a search in the presence of PW7, seized Exhibit P2 from the accused person on 27th March 2020, at about 21.15 hours at Miembe Saba, Kwamfipa area. The said seizure was executed via the certificate of seizure (Exhibit P1). Thereafter PW1 on the same day took Exhibit P2 together with the accused person to Kibaha Police station where he handed over the said Exhibit P2 to PW2. PW2 kept the exhibit until the following morning (28/03/2020) when she handed over Exhibits P2 to one namely Afande Kassim. On the same day 28th March 2020 in the morning, PW4 received Exhibits P2 from D/CPL

Kassim. She registered the exhibits in Exhibits P5 with entries number 65 and 66 of 2020 respectively. Thereafter, she labeled exhibits with their respective exhibit number, together with IR number KBA/IR/1314/2020.

On 2nd April 2020, D/CPL Kassim went to PW4 where he took Exhibit P2 from PW4 for the purpose of taking the same to the Chief Government Chemist (CGC) for laboratory test. On the same day, D/CPL Kassim handed over Exhibit P2 to PW6 who took the same to the CGC together with a letter from the police and Exhibit P7. At the CGC PW6 handed over Exhibit P2 together with a letter and Exhibit P7 to PW3. PW3 after receiving Exhibit P2 signed on Exhibit P7, after taking samples for analysis he filled in and signed on Exhibit P8. Thereafter he sealed the Exhibit with the Government Chemist Laboratory seal, signed on exhibit P2, wrote Lab No. 1205/2020, and stamped on it. PW3 handed it back to PW6 and then PW6 took the said Exhibit to Kibaha Police Station where he handed it over to D/CPL Kassim. Evidence shows that on the same day in the evening hours, PW4 received Exhibit P2 from D/CPL Kassim and kept it until 04th November 2022 when she handed it over to D/CPL Elisante for the purpose of taking the same to the court.

In the case of **Zainabu d/o Nassor @ Zena v. The Republic**, Criminal Appeal No. 348 of 2015 (unreported) it was stated among others that the underlying rationale for ascertaining a chain of custody is to show a

reasonable possibility that the item that is finally exhibited in court as evidence has not been tampered with along its way to the court.

It is now settled law that, oral evidence is now said to be enough to prove the chain of custody of Exhibit. See the case of **Abdallah Rajabu Mwalimu vs. Republic**, Criminal Appeal No. 367 of 2017(Unreported). However, the law does not provide as to what extent to which oral evidence can prove chain of custody. In the case at hand PW3, PW4, and PW6 mentioned one officer namely D/CPL Kassim to have dealt with Exhibit P2, however, the said officer did not come to the court to testify on how he dealt with it. See also the case of **Abas Kondo Gede Vs Republic**, Criminal Appeal No. 472 of 2017 (Unreported)

However, in my careful consideration especially in assessing the coherence of the testimony of each prosecution witness in relation to the evidence of other witnesses in this important and delicate issue of chain of custody, I find that this case is not tainted with contradictions and inconsistencies, as far as the chain of custody is concerned. All seven prosecution witnesses who testified regarding the chain of custody of Exhibit P2 are credible there is no reason for the court not to believe them. See the case of **Goodluck Kyando V R (2006) TLR** in paragraph 363.

In the case of **Abas Kondo Gede Vs Republic**, Criminal Appeal No. 472 of 2017 (Unreported) Court of Appeal at Dar es Salaam, stated that;

'Therefore, even where the chain of custody is broken, the court may still receive the exhibit into evidence depending on the prevailing circumstances in every particular case provided it is established that no injustice was caused to the other party

See also the case of The **DPP v. Akida Abdallah Banda**, Criminal Appeal No. 32 of 2020. In the circumstance, even if one D/CPL Kassim was not called to testify on the party of a chain of custody of Exhibit P2, I find no reason to fault the prosecution evidence on the issue because there was no possibility that Exhibit P2 was in danger of being tampered with and no injustice can be caused on the defence side. Consequently, I find that the chain of custody of Exhibit P2 was not broken from the time it was seized from the accused person to the time the same was tendered in court.

Finally, from the above findings, it is the finding of this Court that, the prosecution side has managed to prove the case against the first accused person to a hilt but has failed to prove the case beyond reasonable doubt against the second accused person. I, therefore, find Abdul Mohamed Shaban, being the first accused person guilty, and I hereby convict the first accused person for the offence charged while I acquit Conrad Jelaz@Chambanenje, the second accused person of the offence of trafficking in

narcotic drugs contrary to section 15(1) (a) of the Drug Control and Enforcement Act [Cap.95 R.E. 2019], read together with paragraph 23 of the First Schedule to and sections 57 (l) and 60 (2) of the Economic and Organised Crime Control Act [Cap.200 RE 2019].

Ordered accordingly.




G.N. Isaya
Judge
30/06/2023

SENTENCE

Whereas the first accused person convicted with the offence trafficking in Narcotic Drugs contrary to section 15(1) (a) of the Drugs Control and Enforcement Act, [Cap 95 RE 2019] read together with paragraph 23 of the First Schedule to and section 57(1) and 60 (2) of the Organized Crime Control Act [Cap 200 RE 2019] as amended

In sentencing the first accused person, I have consider reasons advanced by Mr. Uhagile, State Attorney, that narcotic drugs have adverse effects to all people in society, cause the mental dependence, hinder social-economy development to the country. I consider too mitigation of the first accused person through Ms Mauki learned defence Counsel that the first accused person prayed for a lenient sentence since he is bread winner of his family and his parents as well as he is a first offender.

I have considered the mitigation factors advanced and I am guided by the relevant legislations that is the Drugs Control and Enforcement Act, [Cap 95 RE 2019] and the Organized Crime Control Act [Cap 200 RE 2019]. The later provided for minimum sentence of 20 years towards 30 years which is maximum penalty for a convict of offences laid in the First Schedule to the EOCCA Cap 200 including the one at hand. Since the convict is the first offender who depended by his family and parents, but also having in mind that narcotic drugs pose great danger to the society, people's health and country development. I hereby sentence the convict Abdul Mohamed Shaban to serve twenty (20) years imprisonment.

So, ordered.



G.N. Isaya
Judge
30/06/2023

Right of appeal fully explained to the accused persons and the Republic.



G.N. Isaya
Judge
30/06/2023

Order:

1. Exhibit P2 be destroyed in accordance with the provisions of the Drugs Control and Enforcement Act, Cap 95 and its Regulations, GN. No. 173 of 2016.
2. The prosecution is hereby advised to deal with Exhibit P4 (Motor Vehicle Toyota Noah with Registration Number T300 DCS which is instrumentality of crime) as per section 49A of the Drugs Control and Enforcement Act, Cap 95 RE. 2019.
3. Exhibit P4, and Exhibit P2 narcotic drugs in two sulphate bags shall remain in the custody of the RCO Pwani region while waiting execution of the first and second orders above.




G.N. Isaya
Judge
30/06/2023